

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

75-1049

To be argued by
ALBERT S. DABROWSKI

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1049

UNITED STATES OF AMERICA,

Appellee,

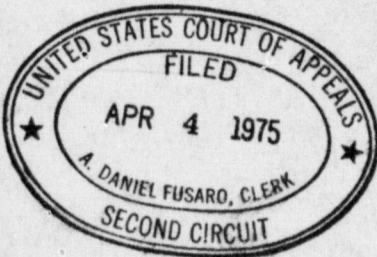
—v.—

ROBERT WAYNE GRANT,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE



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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statutes Involved	3
Question Presented	4
Statement of the Facts	4
ARGUMENT:	
I. There was no violation of Rule 6 of the District of Connecticut Plan for Achieving Prompt Dis- position of Criminal Cases	7
CONCLUSION	11

TABLE OF CASES

<i>Grant v. Alldredge</i> , 498 F.2d 376 (2d Cir. 1974) ...	2
<i>United States v. Bosques</i> , 364 F. Supp. 131 (D. Conn. 1973)	10
<i>United States v. Drummond</i> , Slip Op., 2nd Cir., Feb- ruary 11, 1975, Docket No. 74-2264	7, 8, 9, 10
<i>United States v. Lasker</i> , 481 F.2d 229 (2d Cir. 1973), <i>cert. denied</i> , 415 U.S. 975 (1974)	10

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1049

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT WAYNE GRANT,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

On September 18, 1970 the defendant, Robert Wayne Grant, and four others were indicted by a Federal Grand Jury sitting in Hartford, Connecticut, for the September 8, 1970 armed robbery of the East Hartford Branch of the Glastonbury Bank and Trust Company. Subsequently this indictment was dismissed and, on December 14, 1970, only the defendant was reindicted. He was charged with being the lone gunman who entered and robbed the bank.

Trial by jury commenced on October 31, 1971 before the Honorable T. Emmet Clarie, United States District Judge. Grant was found guilty and, on December 6, 1971, received a sentence of fifteen years in prison. On May 19, 1972 a panel of this Circuit affirmed the conviction from the Bench. (Docket No. 72-1042).

On June 6, 1972, Grant filed a petition to vacate his judgment of conviction pursuant to Title 28, United States Code, Section 2255 and the Public Defender was appointed to represent him. Judge Clarie denied Grant's motion on October 2, 1973 after hearing testimony on April 26, 27 and June 4 and 8, 1973. On June 10, 1974 a panel of this Circuit vacated the judgment of conviction and ordered a new trial. (*Grant v. Alldredge*, 498 F.2d 376 (2d Cir. 1974)). The appellant was released on a \$5,000 surety bond on July 3, 1974. The mandate of this Court did not issue until July 19, 1974 and was not received in the District of Connecticut until July 24, 1974.

The government filed a formal Notice of Readiness on August 28, 1974. On September 24, 1974 the appellant filed a Motion to Dismiss based on Rule 6 of the Plan for Achieving Prompt Disposition of Criminal Cases. The Honorable Thomas F. Murphy, sitting by special designation in Waterbury, Connecticut, denied the motion from the Bench that same day. On October 22, 1974 the appellant filed a second Motion to Dismiss based on Rule 6 which was denied by the Honorable M. Joseph Blumenfeld in a written decision on November 15, 1974.

On Saturday, November 16, 1974, the defendant waived indictment and entered a plea of guilty to a substituted information charging him with receiving approximately \$4,000 in stolen bank funds in violation of Title 18, United States Code, Section 2113(c). The defendant reserved his right to appeal the denial of both of his Motions to Dismiss based on Rule 6. On January 6, 1975 Judge Blumenfeld suspended imposition of sentence and placed the defendant on probation for five years.

Statutes Involved

Plan for Achieving Prompt Disposition of Criminal Cases (United States District Court for the District of Connecticut).

Rule 5 *Excluded Periods*

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the district court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The district court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent.

(Sections (c) through (g) omitted)

(h) Other period of delay occasioned by exceptional circumstances.

Rule 6 *Retrials*

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

Question Presented

Did the government violate Rule 6 of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases?

Statement of the Facts¹

The opinion of this Court ordering a new trial was handed down on June 10, 1974. However, the mandate of this Court did not issue until July 19, 1974 and was not received by the Clerk, United States District Court for the District of Connecticut until July 24, 1974. A copy of the mandate was provided to the United States Attorney by the District Court Clerk's Office on July 24, 1974 (*See* District Court Criminal Docket). The government filed a formal Notice of Readiness on August 28, 1974.

On September 24, 1974 the case was No. 1 on the Criminal Jury Assignment list before the Honorable Thomas F. Murphy sitting at Waterbury, Connecticut.² The defendant requested that a trial date be set to allow him time to consult with counsel. The defendant

¹ The Government and the defendant stipulated to many of these facts on November 15, 1974. The Stipulation is reproduced in the Appendix at 3a.

² At that time a jury was scheduled to be selected on the following day.

also filed a Motion to Dismiss based on Rule 6 of the Plan for Achieving Prompt Disposition of Criminal Cases in which he argued that Rule 6 required the retrial to begin within 90 days of June 10, 1974, the date of this Court's opinion. Judge Murphy denied this motion from the Bench. A Motion for Bill of Particulars and Motions to Suppress were filed on October 3 and 4, 1974, respectively. Hearings on these motions were scheduled for October 11, 1974.

During the late afternoon of October 10, 1974 the Government was notified by hand delivery of a letter dated that same date from a Dr. Desmond M. McGann, that the defendant was "emotionally too ill to go to Court on 10-11-74 [and] . . . will not be able to act adequately in his own defense until approximately 11-1-74."³ On October 11, 1974 the defendant appeared in Court and requested a continuance for medical reasons based on the letter from Dr. McGann. The Court denied the request after two Court appointed psychiatrists examined the defendant that morning and found him to be competent to stand trial. After a second motion for a continuance was denied by Judge Murphy, the defendant, against the Public Defender's advice, voluntarily left the Courtroom. Judge Murphy denied the defendant's Motion for a Bill of Particulars, and, after a hearing, denied one of the Motions to Suppress. Judge Murphy deferred a ruling on a second Motion to Suppress until trial.

On October 23, 1974 the case was No. 1 on the Criminal Jury Assignment list before the Honorable M. Joseph Blumenfeld, at Hartford, Connecticut. The defendant had been advised that in view of the Plan for Achieving Prompt Disposition of Criminal Cases the Government

³ By coincidence, November 1, 1974 was the date Judge Murphy was then scheduled to depart the District of Connecticut for an extended period.

had requested the Court to set this case for immediate trial and that a jury would be selected on the following day.' On October 23, 1974 the Court granted a defense request for a continuance of three weeks in which to complete the preparation of his case after he waived, in writing, any rights under Rule 6 related to or arising from any period of delay between October 23, 1974 and November 19, 1974. The case was scheduled for trial on November 19, 1974.

On October 22, 1974 the defendant filed another Motion to Dismiss arguing that the government had violated Rule 6 by failing to commence trial within 90 days of the July 19, 1974 mandate. On November 15, 1974 Judge Blumenfeld denied this motion holding that the exclusion provisions of Rule 5(a) related to pre-trial motions were applicable to the 90 day period under Rule 6.

On November 16, 1974 the defendant waived indictment and entered a plea of guilty to a substituted information charging him with receiving stolen bank funds in violation of Title 18, United States Code, Section 2113(c). The defendant reserved his right to appeal both of his Motions to Dismiss based on Rule 6.

* See Waiver of Right to Prompt Disposition of Criminal Case filed by the defendant on October 23, 1974 reproduced in the Appendix at page 1a.

ARGUMENT

I.

There was no violation of Rule 6 of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases.

The defendant appeals from the denial of two separate but closely related Motions to Dismiss based on Rule 6 of the District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases. By decision dated June 10, 1974 a panel of this Circuit vacated the appellant's bank robbery conviction and ordered a new trial. Contrary to Rule 41 of the Federal Rules of Appellate Procedure and for an unexplained reason, the Mandate of this Circuit was not issued until July 19, 1974, and was not received in the District of Connecticut until July 24.⁵

The defendant's first motion to dismiss pursuant to Rule 6 was filed on September 24, 1974 and was based on the claim that the government had not commenced trial within 90 days of June 10, 1974, the date of the Second Circuit's decision. The appellant having since had the benefit of this Court's recent decision in *United States v. Drummond*, Docket No. 74-2264 (February 11, 1975) now concedes that Judge Murphy properly denied this motion. (Brief for Appellant at 7). The defendant's second motion to dismiss based on Rule 6 accepted July 19, 1974 as the day from which the 90 day period began to run but argued that the period had expired by Oc-

⁵ Rule 41 states, in pertinent part: "The mandate shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order." In this case 21 days elapsed on July 1, 1974.

tober 22, 1974, the date the motion was filed. Judge Blumenfeld denied this motion on November 15, 1974 ruling that Rule 5(a) relating to delays resulting from the filing of pre-trial motions excluded a critical seven (7) day period in computing the 90 day period under Rule 6. The appellant "no longer contends that the Government failed to retry the defendant within 90 days of July 19, 1974 as Judge Blumenfeld's reasoning . . . is substantially supported by the ruling in *Drummond*." (*Id.* at 8).

The appellant's present claim, that the 90 day period under Rule 6 commenced on July 1, 1974 (21 days after the decision but 19 days prior to the filing of the mandate) is raised for the first time on this appeal. Simply stated, the appellant concedes that he cannot prevail on this appeal unless the 19 days between July 1, 1974, the date the mandate should have issued, and July 19, 1974, the date the mandate actually issued, are included in computing the 90 day period during which a trial must commence under Rule 6.

The government does not contend that the formal Notice of Readiness filed on August 28, 1974 tolled the 90 day period under Rule 6. That argument was clearly rejected in *United States v. Drummond*, *supra* at 1786. However, in *Drummond*, this Court stated that "in view of the rigidity of the command of Rule 6, we believe that in this case the escape hatch of 'good cause' must be construed with an awareness of practicalities." *Id.* a comparison of the facts in *Drummond* with the facts in this case highlights the practicalities involved.

In *Drummond*, this Court noted that "the prosecution was ready to try Drummond again without undue delay. . . ." (*Id.* at 1788.) In the case at bar the government not only filed a formal Notice of Readiness but advised the defendant that the District Court had been requested

to set this case for immediate trial in view of the Plan for Achieving Prompt Disposition of Criminal Cases. (See Waiver of Right to Prompt Disposition of Criminal Case. Appendix.) In setting the trial date for October 23, 1974 both the District Court and the Government relied on July 19, 1974 as the date on which the 90 day period commenced.

The Court in *Drummond* also stated that "while we would not ordinarily regard a defendant's inaction as significant in enforcing the speedy trial rules, in the context of this case and on these facts, we point out that Drummond was free on bail throughout the relevant period and made no request that the judge reassign the trial." *Id.* (Citations omitted). Grant was released after posting a \$5,000 bond on July 3, 1974 and he never requested that his case be tried promptly. In fact, he repeatedly engaged in tactics designated to or which had the effect of delaying proceedings before the Court. On September 24, 1974 the defendant requested "more time to consult with counsel." On October 11, 1974 the defendant requested a continuance until November 1, 1974 based on "emotional" problems. He was examined the same day and found to be competent to stand trial. After a second motion for a continuance was denied that same day the defendant left the Courtroom against his counsel's advice. On October 23, 1974 the defendant, faced with trial the following day, requested "an additional three weeks in which to prepare his case" and waived all rights under the Plan for Achieving Prompt Disposition of Criminal Cases related to the period of time between October 23, 1974 and November 19, 1974. (See Appendix).

As Judge Blumenfeld stated in Ruling on the defendant's second motion to dismiss at 4-5:

As frequently stated, "the philosophy underlying these Rules seeks to vindicate the *public's interest*

in the swift and just administration of criminal justice." *United States v. Bosques*, 364 F. Supp. 131, 134 (D. Conn. 1973) (emphasis in original); *United States v. Lasker*, 481 F.2d 229, 233 (2d Cir. 1973), *cert. denied* 42 U.S.L.W. 3523 (March 19, 1974). The defendant has failed to demonstrate any way in which the public's interest would be vindicated by permitting defendants to outmaneuver the Court and the government and obtain a dismissal with such relative ease.

Both Judge Murphy and Judge Blumenfeld, like Judge Platt in *Drummond*, were ready to try the case almost immediately. The case was No. 1 on Jury calendars before both Judges and the District Court disposed of motions in an expeditious fashion.

The government submits that, under all the circumstances, the relevant time period was extended for "good cause" once Judge Murphy called this case for trial on September 24, 1974 and the defendant commenced his series of requests for continuances. To rule otherwise places the power of dismissal in the hands of defendants willing to engage in dilatory tactics. It is not necessary to decide whether the 90 day period commenced on July 1, 1974 or July 19, 1974 since September 24, 1974 is within 90 days of either date.

In any event the government should not be penalized for reasonably relying on the date the mandate was actually issued. There is no evidence of any prejudice to the defendant. In fact, in view of the defendant's Waiver of Right to Prompt Disposition of Criminal Case filed October 23, 1974 in which he requested additional time to prepare his case, it is evident that any prior delay operated to the defendant's advantage. The Court in *Drummond* at 1788 noted that a significant portion of the delay in that case was not due to a deliberate effort

by the prosecution to postpone the trial or to any failure by the District Court but to "an unexplainable delay by this Court in issuing the mandate." In the absence of prejudice to the defendant the government should not be penalized for a clerical error by the Court of Appeals.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
for the District of Connecticut
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 New Haven, Connecticut 06510

ALBERT S. DABROWSKI
Assistant United States Attorney
for the District of Connecticut

GOVERNMENT'S APPENDIX

INDEX TO GOVERNMENT'S APPENDIX

	PAGE
Waiver of Right to Prompt Disposition of Criminal Case	1a
Stipulation	3a



**Waiver of Right to Prompt Disposition of
Criminal Case**

United States District Court

DISTRICT OF CONNECTICUT

Criminal No. H-35

UNITED STATES OF AMERICA

—v.—

ROBERT WAYNE GRANT

1. The defendant has been notified by the Clerk of the United States District Court, Hartford, Connecticut that his case will be called for jury assignment on October 23, 1974 before the Honorable M. Joseph Blumenfeld, United States District Judge.

2. The defendant has been further advised by the Clerk of the Court that a jury panel will be present on October 24, 1974 for jury selection.

3. The defendant has been advised by Assistant United States Attorney, Albert S. Dabrowski, that in view of the Plan for Achieving Prompt Disposition of Criminal Cases, the government has requested the Court to set this matter for immediate trial.

4. Counsel for the defendant states that in view of his recent heavy trial schedule, the difficulty he will experience in collecting defense witnesses on short notice,

Waiver of Right to Prompt Disposition of Criminal Case

and the difficulty in preparing a case involving evidence which is several years old, he will require an additional three weeks in which to prepare his case.

5. In view of No. 4 above, the defendant intends to request that the Court grant the defendant a three (3) week period of delay in which to complete the preparation of his case.

6. Accordingly, the defendant, by and through his counsel, hereby waives any and all rights to which he may be entitled under the Plan for Achieving Prompt Disposition of Criminal cases related to or arising from any period of delay between October 23, 1974 and November 19, 1974.

7. The defendant reserves any and all rights conferred on him as a result of any delay related to or arising out of other periods of time, including, but not limited to, those periods of time referred to in the defendant's Motion to Dismiss for failure to commence re-trial within 90 days of the mandate of the United States Court of Appeals for the Second Circuit.

Dated at Hartford, Connecticut, this day of October, 1974.

The Defendant
ROBERT WAYNE GRANT

By
CHARLES STURTEVANT
Federal Public Defender
450 Main Street
Hartford, Connecticut 06103

Stipulation

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Criminal No. H-35

UNITED STATES OF AMERICA

—v.—

ROBERT WAYNE GRANT

It is stipulated between the Plaintiff, United States of America, and the defendant, Robert Wayne Grant, by and through his counsel, Charles Sturtevant, as follows:

1. By decision dated June 10, 1974 the United States Court of Appeals for the Second Circuit vacated the judgment of conviction and ordered a new trial.
2. The Mandate of the United States Court of Appeals was dated and filed July 19, 1974.
3. The Plaintiff, United States of America, filed a formal Notice of Readiness on August 28, 1974.
4. The case was No. 1 on the Criminal Jury Assignment list for September 24, 1974 before the Honorable Thomas F. Murphy, Waterbury, Connecticut.
5. On September 24, 1974 the defendant filed a Motion to Dismiss pursuant to the Plan for Achieving Prompt Disposition of Criminal Cases.

Stipulation

Judge Murphy denied said motion on the same date.

6. On October 3, 1974 the defendant filed a Motion for Bill of Particulars.

7. On October 4, 1974 the defendant filed a Motion to Suppress a photograph and a Motion to Suppress a post-conviction statement of the defendant.

8. On October 10, 1974 the plaintiff was notified by hand delivery of a letter dated that same date from Dr. Desmond M. McGann, that the defendant was "emotionally too ill to go to Court on 10-11-74 [and] . . . will not be able to act adequately in his own defense until approximately 11-1-74."

9. On October 11, 1974 the defendant was examined by two psychiatrists who found no "emotional or psychiatric illness that would prevent him from standing trial at the present time."

10. On October 11, 1974 Judge Murphy denied the defendant's Motion for Bill of Particulars, and, after a hearing denied the defendant's Motion to Suppress the post-conviction statement of the defendant. Judge Murphy declined to Rule on the Motion to Suppress the photograph stating the decision should be made at trial.

11. The case was No. 1 on the Criminal Jury Assignment List for October 23, 1974 before the Honorable M. Joseph Blumenfeld, Hartford, Connecticut.

Stipulation

12. On October 23, 1974 the defendant filed a Waiver of Right to Prompt Disposition of Criminal Case for the period October 23, 1974 to November 19, 1974.

13. The case is set for Jury Trial on November 19, 1974.

Dated at Hartford, Connecticut, this 14th day of November, 1974.

UNITED STATES OF AMERICA
PETER C. DORSEY

.....
United States Attorney

By
ALBERT S. DABROWSKI
Assistant U.S. Attorney

ROBERT WAYNE GRANT

By
CHARLES STURTEVANT
Counsel for Defendant

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-1049

UNITED STATES OF AMERICA

Appellee

v.

ROBERT WAYNE GRANT

Appellant

AFFIDAVIT OF SERVICE BY MAIL

David Candelaria, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 227 St Ann's Ave
Bronx, N.Y.

That on the 4th day of April, 1975, deponent served the within Brief and Appendix for the Appellee
upon Charles Sturtevant, Esq.,
Federal Public Defender
450 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

David Candelaria

This 4th day of April 197 5

Edward A. Quimby
EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977

